

# IT'S WHAT'S FOR LUNCH: NECTARINES, MUSHROOMS, AND BEEF—THE FIRST AMENDMENT AND COMPELLED COMMERCIAL SPEECH\*

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JAMES WEINSTEIN: Time for dessert, intellectual dessert. It's my great pleasure to introduce and moderate a discussion between two of the nation's most distinguished law professors: Kathleen Sullivan and Robert Post. Any introduction that would do justice to their accomplishments would take up far too much of the short time allotted. So, by way of a very summary and incomplete introduction, Kathleen Sullivan is the Stanley Morrison Professor of Law at Stanford Law School where she served as dean from 1999 to 2004. She is the author of numerous works on various aspects of constitutional law, including, with the late Gerald Gunther, co-author of the leading constitutional case book.<sup>1</sup> Robert Post is the David Boies Professor of Law at Yale Law School and also the author of numerous works on constitutional law, including *Constitutional Domains*, an extremely influential book on free speech.<sup>2</sup> Despite their wide-ranging interests and accomplishments in other areas of constitutional law, I think it's fair to say that they both have written most extensively on and have a special interest in free speech. Both have written important articles on commercial speech, including, as

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\* On February 23–24, 2007, Loyola Law School, Los Angeles held the live symposium Commercial Speech: Past, Present & Future. This transcript is from the February 24th lunch panel, which was moderated by James Weinstein, Amelia D. Lewis Professor of Constitutional Law, Sandra Day O'Connor College of Law at Arizona State University. The transcript has been edited for clarity and grammar by *Loyola of Los Angeles Law Review*.

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1. GERALD GUNTHER & KATHLEEN SULLIVAN, CONSTITUTIONAL LAW (16th ed. 2007).
2. ROBERT C. POST, CONSTITUTIONAL DOMAINS (1995).

it turns out, in *The Supreme Court Review*.<sup>3</sup> And, Robert Post's recent article in that publication is on the subject of today's presentation, compelled commercial speech.<sup>4</sup>

So, here's the menu for today's lunchtime entertainment. Kathleen will give a short description of the relevant cases: Robert will then give an analysis of these decisions, followed by a commentary by Kathleen. Then after a response by Robert we will have, time permitting, a more free flowing discussion between the two. As for the ground rules, I insist on only one thing: under no circumstances are there to be any more pathetic food puns. I think I've already milked that half-baked idea for about all it's worth. We will now hear from Kathleen.

KATHLEEN M. SULLIVAN: I don't know. I thought we would try to combine the three cases into tournedos-Rossini-flambé. Well, we turn now to the all-important question of the First Amendment right not to be forced to say: "Got milk?"; "Beef, it's what's for dinner"; [and] "Pork, the other white meat." There's a host of these cases about compelled exactions to support generic food product advertising campaigns. They've percolated along in the lower courts. We'll talk about three Supreme Court cases: the stone fruit case involving nectarines, plums and peaches, *Glickman v. Wileman Bros. & Elliott, Inc.*;<sup>5</sup> the mushrooms case, *United States v. United Foods*;<sup>6</sup> and the beef case, *Johanns v. Livestock Marketing Association*.<sup>7</sup> But, in the lower courts, there are lots of other products that have been at stake, including crocodile skins,<sup>8</sup> a case that could be entitled, "You, You're What's for Dinner."

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3. Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart*, 1996 SUP. CT. REV. 123; Robert C. Post, *Compelled Subsidization of Speech: Johannis v. Livestock Mktg. Ass'n.*, 2005 SUP. CT. REV. 195 [hereinafter Post, *Compelled Subsidization*]; see also Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 25 (2000).

4. Post, *Compelled Subsidization*, supra note 3; see also Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in United Foods, Zauderer, and Abood*, 40 VAL. U. L. REV. 555 (2006).

5. 521 U.S. 457 (1997).

6. 533 U.S. 405 (2001).

7. 544 U.S. 550 (2005).

8. See *United States v. Shaffett*, 95 F.2d 1148 (5th Cir. 1996), cert. denied, 520 U.S. 1120 (1997).

Turning to this question, I just want to go back and revisit some First Amendment first principles. The Court has established that, just as there's a right to speak, there's a right not to speak. So, we have a line of cases invalidating speech compulsions, including the right not to have to salute the flag in a classroom upheld in *West Virginia State Board of Education v. Barnette*;<sup>9</sup> not to have to become a mobile billboard for the state's politically contestable slogan, "Live Free or Die," in the New Hampshire license plate case, *Wooley v. Maynard*;<sup>10</sup> or, not to have to include in a St. Patrick's Day Parade an overt contingent proclaiming that it's the gay and lesbian Irish contingent of Boston in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*.<sup>11</sup> In the *Hurley* case, Justice Souter, writing for the Court, said that it's not sufficient that the parade might seek to disclaim the gay contingent—you can't exactly stop every few blocks in the parade, stop singing *Danny Boy* and say, "We disavow the gay contingent"—and Justice Souter also said, "We're not quite sure what the St. Patrick's Parade is trying to say, but we didn't know what Lewis Carroll's poem *Jabberwocky* meant, we didn't know what Jackson Pollock or Arnold Schoenberg meant with their art or music."<sup>12</sup> So, it doesn't matter if we know exactly what Wacko Hurley and the boys are saying. What we do know is they have the right to exclude unwanted speech from their parade.

So, we can think of *Barnette*, *Wooley* and *Hurley* as involving an unadulterated right not to speak and not to have speech forced upon one where one will be associated with that speech, as in the gay contingent in the St. Patrick's Day Parade. The First Amendment right not to speak is extended to a right not to sponsor speech, not to become a platform for the speech of third parties which you believe will be associated with you and with which you disagree.

By the way, the disagreement doesn't have to be ideological in these cases. That was the point of the Lewis Carroll, Jackson Pollock, Arnold Schoenberg comparison that Justice Souter made in *Hurley*.<sup>13</sup> He wasn't insisting that you want to not speak or not

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9. 319 U.S. 624 (1943).

10. 430 U.S. 705 (1977).

11. 515 U.S. 557 (1995).

12. *Id.* at 569.

13. *Id.*

sponsor speech because you disagree with it.<sup>14</sup> You simply don't want to speak at all through the vehicle that's being thrust on you.<sup>15</sup> The right not to sponsor speech comes up in cases like *PG&E v. Public Utilities Commission*,<sup>16</sup> which says that a publicly regulated utility does not have to include in its billing envelope, even if there's space that doesn't require an increase in the postage required, the speech of anti-electricity consumption groups like TURN<sup>17</sup> that want to occupy and co-speak in the space.

Now, the Court has rejected extensions of *PG&E* in cases where it reasons that the corporate speaker will not be associated with the speech. The PruneYard Shopping Center will not be associated with the speech of anti-Zionist leaflet distributors outside the shoe store because everyone will think PruneYard is about shoes, not leaflets and no one will attribute the speech to the owner.<sup>18</sup> Similarly, in *Turner Broadcasting v. F.C.C.*,<sup>19</sup> the Court rejected a claim that cable operators were being compelled to speak in violation of the *Barnette* principle when they had to carry broadcast signals they would prefer not to carry. The Court reasoned that there was no troubling compelled speech there.<sup>20</sup> This was a content-neutral, industry-specific antitrust regulation regulating a choke hold monopoly by cable, not an infliction of compelled speech in the sense of *Barnette*, *Wooley*, *Hurley* or *PG&E*.

So, we know there's a line of cases about not having to speak against one's will or to sponsor speech against one's will. There's a second line of cases about not having to be associated with members of an organization with whom you would rather not associate as an extension of the speech principle. Boy Scouts do not have to include an avowedly gay scoutmaster if their creed means straight Boy Scouts, in effect.<sup>21</sup> Chief Justice Rehnquist essentially was saying, if you want to have Gay Boy Scouts, go have Gay Boy Scouts and you

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14. *Id.*

15. *Id.* at 573–74.

16. 475 U.S. 1 (1986).

17. Toward Utility Rate Normalization (“TURN”).

18. See *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

19. 520 U.S. 180 (1997).

20. *Id.* at 213–14.

21. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000).

can have a gay scoutmaster in the Gay Boy Scouts.<sup>22</sup> And I must say that if we had Gay Boy Scouts, we'd surely have a much more fashionable uniform.

Just as the compelled speech line of cases has its limits where the sponsored speech will not be attributed to the objecting speaker, so too the compelled association line of cases has its limits when the allegedly offending association isn't really contrary to the speaker's speech. The Jaycees and the Rotary Club aren't allowed to exclude women because they're not the male supremacist society, and there's nothing incompatible with women's membership in the Jaycees, as there might be in the Boy Scouts.

Now, you extract from these two lines of cases the line of cases we'll talk about today: a First Amendment claim against the compelled exaction of financial payments to subsidize speech one would prefer not to subsidize with respect to generic agricultural marketing schemes. Such schemes exact funds for advertising all beef to increase demand for beef; advertising all pork to increase demand for pork; advertising all stone fruits to increase demand for all stone fruits; advertising mushrooms generically to increase demand for mushrooms. And the objecting speakers in these cases say, "But I don't think my plum is just like your plum. I think my plum is better than your plum. It's organic, it's small, it's hybrid. It doesn't cause illness if eaten when green." Or, "I don't think my mushrooms are the same as your mushrooms. My beef, grass fed on organic grass, and not subjected to cruel and unusual slaughtering procedures, is different from your beef."

So, individual commercial dissenters want to say, so to speak, that being compelled to support generic advertising schemes infringes their right of disassociation or their right of silence, the right not to have to support speech with which they disagree. They rely, of course, on another line of cases: the *Abood*<sup>23</sup> line of cases. This line of cases says that having to pay for speech is just like having to speak, and if you have to pay for speech through a government exaction that is used for purposes that are not germane to the reason we exacted the money—it's being used for something

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22. *Cf. id.* at 655–56 (holding that the Boy Scouts as an "expressive association" has a First Amendment right to protect the expressive message of its choice).

23. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235–36, 240 (1977).

else—you have a conscientious objector's right to have a pro rata refund of your funds to the extent they are going to the non-germane purpose.

Now, what does all that translate into? If I am required to pay dues to a union because I work for a union shop or governmental agency, I may have to pay dues to the union so it can engage in collective bargaining activities. But I get a refund to the extent that the union is campaigning on a referendum issue, supporting a political party, or engaging in speech activities unrelated to collective bargaining with which I disagree. If I'm in an integrated bar state—this is the *Keller*<sup>24</sup> case—I may have to pay dues to the integrated bar in order to protect against violations of attorney disciplinary rules, pay into an escrow fund to support repayment to victims of malpractice and so forth. I may have to pay into the bar to the extent it is promoting the administration of justice and preserving the interests of the organized bar, but I'm not required to pay into the bar association to the extent it's speaking out on other controversial issues—the correctness of the war, the rightness of *Roe v. Wade*,<sup>25</sup> and so forth. I get a pro rata refund. Just as there's a *PruneYard-Turner* limit to the *PG&E* line of cases, just as there's a *Jaycees* limit to the *Boy Scouts* case, there is also a limit to this line of cases.

Sometimes when we're forced to pay into an organization where we can't really disaggregate the germane from the non-germane purposes, we do have to pay. This is *Board of Regents of University of Wisconsin System v. Southworth*,<sup>26</sup> in which the Court says we can't imagine how in a university you can segregate the ideas that are at the center of the university's mission from the student organization activities that are at the periphery. We decline to go into this and so we just say that as to exactions from Christian students who don't want to support Planned Parenthood activities or vice versa, Planned Parenthood supporters who don't want to support the Christian organizations, you don't have an *Abod* right to dissent from student organization fees, period. So, there's a limit to all these cases. And we might say that in the compelled exaction cases the ultimate limit is that we don't have an *Abod* right not to pay our taxes, no matter

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24. *Keller v. State Bar*, 496 U.S. 1, 4–5 (1990).

25. 410 U.S. 113 (1973).

26. 529 U.S. 217, 231 (2000).

how much every April 15th, we think of all the things we dissent from that those taxes are going to, whether it's inappropriate agricultural marketing schemes or the war in Iraq. The ultimate limit on the *Abood* line of cases is that nobody thinks you have a First Amendment right not to pay your taxes. That's the general background

Let's go now to the stone fruit, mushrooms and beef decisions.<sup>27</sup> This is a trilogy of cases that I think nobody will disagree exemplifies the kind of doctrinal instability and incoherence that Bruce [Johnson] was referring to on the panel when he described them. Just to recap the bidding on these: *Glickman* upholds against First Amendment challenge the compulsion of fee payments from stone fruit growers into the agricultural marketing scheme for stone fruits, reasoning that, first, there was no violation of conscience involved.<sup>28</sup> It wasn't like you're against plums. If you're a plum grower, you're for plums. It's not like being made to worship a graven image or to do something that is against your principles. You're a plum person, but you just think your plums are better. So, there's no ideological self-contradiction in making you pay into the generic scheme just because you would prefer to have an individualized scheme that promotes your plums against others.

Second, the majority says that the exaction is germane to the larger content-neutral purpose of running a Stalinist command-and-control collective agricultural scheme.<sup>29</sup> You might debate the wisdom of having a Stalinist agricultural scheme, but if you have one, compelled exactions for advertising are simply part and parcel of other collective obligations that the growers have to pool their resources. Therefore, this is more like paying your bar dues to the bar to work for protecting clients against lawyer malpractice; it's more like paying your dues to the labor union in order to engage in collective bargaining. It's not like having to pay the organization to do something that's non-germane to its original reason for existing, and therefore it's permissible. That's an opinion by Justice Stevens, joined by Justices O'Connor, Kennedy, Ginsburg and Breyer, saying essentially we'll relegate this out of the First Amendment, it gets

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27. *Glickman v. Weilman Bros. & Elliot, Inc.*, 521 U.S. 457 (1997); *United States v. United Foods*, 533 U.S. 405 (2001); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005).

28. *Glickman*, 521 U.S. at 472.

29. *Id.* at 473.

rationality review and we uphold it as a species of economic regulation.<sup>30</sup>

Justice Souter, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, dissents, saying that, just as we said in *Hurley*, it doesn't matter if you disagree with the point that's being made.<sup>31</sup> The point is that you have a right not to be compelled to speak. Paying for speech is being compelled to speak indirectly. Therefore, this violates the principle of protecting your conscience. Therefore, they would have applied at least *Central Hudson*,<sup>32</sup> an intermediate scrutiny standard.

Four years later, the Court goes exactly the other way in *United States v. United Foods*.<sup>33</sup> Now the Court invalidates, under First Amendment challenge, a compelled exaction to pay into a generic advertising scheme for mushrooms. The mushroom-stone fruit distinction being insufficient to explain the case, we have to ask: what is? And, the difference here is that now the majority is Justice Kennedy plus Chief Justice Rehnquist and Justices Stevens, Scalia, Souter, and Thomas. So, we have the dissenters from the stone fruit case forming the majority here, picking up the votes of Justices Kennedy and Stevens.

Now, Justice Kennedy, writing for the Court, says the mushroom exactions are not going into a general scheme. The Mushroom Council exists for the purpose of speaking and only for speaking. We don't have Stalinism for mushrooms.<sup>34</sup> For some strange reason, we have competition for mushrooms except with respect to speech, and therefore when we exact payments for mushroom advertising, we are burdening the right to speak and only the right to speak of those who pay into it, and there can't be any defense of that. The mushrooms are not part of a larger marketing scheme, and in the Court's words, the expression that the growers are required to support is not germane to a purpose related to an association independent from the speech issue. In other words, the government can't set up an advertising agency and make you pay into this. It can set up a larger marketing board that does a lot of

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30. *Id.* at 473 n.16.

31. *Id.* at 488–89.

32. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 567, 573 (1980).

33. *United States v. United Foods*, 533 U.S. 405, 409–10 (2001).

34. *Cf. id.* at 408 (describing the Mushroom Council's mission as an industry advocate).



economic things and advertising can be a component, but it can't single out your exaction for speech alone.

Justices Breyer, Ginsburg, and O'Connor dissent in *United Foods*, holding that it's indistinguishable from *Glickman*, stating that it's ludicrous to draw a general scheme versus a specific speech scheme distinction, and suggesting that the requirement is good for speech here.<sup>35</sup> Justice Breyer expresses a kind of disagreement with Justice Souter's autonomy principle.<sup>36</sup> He says, I see the First Amendment as about speech. This program expands speech, it promotes speech, it gets speech out there. What's wrong with getting speech out there? He again would say this is a far cry from *Barnette* and *Wooley*. This is just a species of economic regulation.

Then, two terms ago, *Johanns v. Livestock Marketing*<sup>37</sup> comes down and it flips again. And, again, the Justices scatter like bowling pins into a new array. This time the Court upholds against First Amendment challenge the compelled exactions for the "Beef, it's what's for dinner" campaign.<sup>38</sup> This time, Justice Scalia, a dissenter from the *Glickman* decision, writes for the Court, saying that this is a compelled exaction for speech, but it's a compelled exaction for speech as part of a broader marketing program—so, beef marketing is more like stone fruit than like mushroom marketing with respect to its relative degree of Stalinism. But the difference here is that, when we say "Beef, it's what's for dinner," that's the government speaking, and when the government speaks, there can be no First Amendment offense that I have to pay into that ad campaign because, just as I have to pay into general taxation, paying into spot taxation in this instance will not associate me with the speech and it will not violate my First Amendment rights.<sup>39</sup> Everyone will know that this is the government speaking, not the beef producers. There's only one problem with that argument. By law, the signs are required to be signed with a trademark paid for by America's Beef Producers. But, Justice Scalia said, pay no attention to that label on the sign.<sup>40</sup> Everybody knows that that's really Secretary Johanns speaking.

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35. *Id.* at 419–20.

36. *Id.* at 422.

37. 544 U.S. 550 (2005).

38. *Id.* at 566–67.

39. *Id.* at 564 n.7.

40. *Id.* at 562–63.

Secretary who? That's really the Secretary speaking because the law requires him to supervise the board which is a mixed public/private board. And, he's in effect drafting the speech. Now, this move by Justice Scalia will remind you of the *Rust v. Sullivan*<sup>41</sup> decision as it's re-conceptualized in *Rosenberger*<sup>42</sup> and *Velazquez*.<sup>43</sup> In *Rust*, the Court decided that it's okay to give money to family planning organization on condition that they not counsel or encourage abortion. On the first go around, *Rust* looks like a decision that there's really no viewpoint discrimination involved. Later, Justice Kennedy, writing for the Court in *Velazquez*, says: oh yes, there's viewpoint discrimination involved in *Rust*, it's just that it was the government speaking so that is permissible.<sup>44</sup> Everyone knew that when your doctor told you to go to this place and they'll allow you to carry your pregnancy to term, it was really Surgeon General Koop speaking, not your doctor. Same principle here in the beef case. We know it's really the government speaking, and therefore there is no First Amendment right against a compelled exaction.

There's a little aside here that maybe there could be an as-applied challenge if one really could prove that the ads would be attributed to the beef producer who has a right not to be associated with the ad, but it was held that this was not proved on this record. There was evidence on the record that the beef producer said, "I don't really think this ad will be attributed to me."

Now, let's sum it up and then I'll turn it all over to Robert to give some normative response to this. We have only four justices who are consistent: Justices Breyer, Ginsburg, and O'Connor would uphold all three compelled exactions against First Amendment challenge, reasoning that these regulations sound in *Lochner v. New York*,<sup>45</sup> they are a species of economic regulation, they are not regulations of speech, and the fine distinctions between a general program or speech-specific program, or between producer speech or government speech, don't matter and don't distinguish the cases. Justice Souter is the only justice who would consistently invalidate all three programs, reasoning that the autonomy principle governs all

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41. 500 U.S. 173 (1991).

42. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995).

43. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001).

44. *Id.* at 541.

45. 198 U.S. 45 (1905).

three alike. He quotes Thomas Jefferson saying it is tyrannical and sinful to make a man pay to support a position with which he disagrees. He's the only one who goes for autonomy all the way. The other justices divide, with Justices Kennedy and Stevens drawing the general program/speech-specific program distinction and with Chief Justice Rehnquist and Justices Scalia and Thomas drawing the government speech/producer speech distinction. So, you've got Rehnquist, Scalia, and Thomas all saying in effect, "oh, my goodness, if we really take this seriously, everyone will have an *Abood* right on April 15th to withhold portions of their taxes based on their pro rata objection to listed government policies." They look into that abyss and blink and say government speech is fine. It's fine if your Stalinism is perfect. It's just not fine if your Stalinism goes halfway there.

So, those are the cases. I think what we see now is that there's at least a qualified right not to have compelled exactions to pay for generic advertising campaigns mandated by the government. You'll win more if you can show that the speech is the speech of the producers or can be attributed to the producers, and less if the speech is the speech of the government or that will be attributed to the government.

WEINSTEIN: Thanks, Kathleen. Isn't that a very pleasant way to have digested for you about 812 pages of U.S. Reports? Very well done, indeed. And now over to Robert for a commentary on Kathleen's summary.

ROBERT C. POST: Kathleen did an amazing job summarizing these very complicated cases. My role here is to ask what I generally ask in panels on this subject—whether there is in fact a general right not to be compelled to speak.

So, for example, if you receive a subpoena to testify in court, does the subpoena pose a First Amendment problem? If you are compelled to serve on a jury and to pronounce a verdict, does that compulsion pose a First Amendment problem? If California enacts legislation requiring motorists to report vehicle accidents, is the law questionable under the First Amendment? If a state requires doctors to report instances of child abuse or AIDS, is this requirement constitutional under First Amendment?

There are many, many, many analogous instances in which speech is compelled, and in which no one perceives any First Amendment issue to arise. This suggests to me that in the abstract compelled speech is not a First Amendment issue. And if compelled speech is not a First Amendment issue, it follows *a fortiori* that compelled subsidization of speech is not a First Amendment issue. This is because the only reason that compelled subsidization of speech can possibly raise a constitutional question is that it may be regarded as a form of compelled speech.

The intense conceptual problem posed by compelled subsidization of speech is foregrounded in the *Glickman*<sup>46</sup> trilogy of cases—*Glickman*,<sup>47</sup> *United Foods*,<sup>48</sup> and *Johanns*.<sup>49</sup> These cases illustrate just how deeply the judiciary is staggering under the burden of making sense of commercial speech doctrine. These cases turn on the question of whether persons can be required to subsidize commercial speech with which they happen to disagree. The Court is completely lost in trying to understand this question. *United Foods* essentially reverses *Glickman*, and *Johanns* essentially reverses *United Foods*. The Court couldn't be more confused. Taken together, the trilogy not only fails to provide guidance to lower courts, but it reveals the most frightening internal theoretical incoherence about why commercial speech should receive constitutional protection and about what kind of protection it should receive.

To begin with the *Glickman* case, Stevens's opinion offers three distinct and inconsistent justifications for its conclusion.<sup>50</sup> The broadest justification is that the legislation is merely a species of economic regulation with no First Amendment implications. Breyer and Ginsberg, alone among the Justices, continue to advance this rationale in *United Foods* and *Johanns*. The second justification is that mandated speech is constitutional so long as the state compels only speech that is not ideological. Because compelled commercial speech is not ideological, it is constitutionally acceptable. The third

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46. *Glickman v. Weilman Bros. & Elliot, Inc.*, 521 U.S. 457 (1997); *United States v. United Foods*, 533 U.S. 405 (2001); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005).

47. 521 U.S. 457.

48. 533 U.S. 405.

49. 544 U.S. 550.

50. *Glickman*, 521 U.S. 457.

justification is that government can compel speech if it is necessary to do so to achieve a sufficiently important state objective. These three inconsistent explanations are all compacted in the *Glickman* opinion. It is very, very hard to discern what *Glickman* actually means.

Four years after *Glickman* the Court reversed itself in *United Foods*,<sup>51</sup> which concerns compelled advertising for mushrooms. Kennedy wrote *United Foods* in the broadest, most expansive possible language.<sup>52</sup> He explicitly says that a person can never be compelled to subsidize speech with which he disagrees.<sup>53</sup> But, as I pointed out at the beginning of my remarks, this kind of abstract generalization immediately runs into insuperable difficulties. Just to give you a simple example, how is the Court going to deal with statutes that compel parties to pay for their opponent's attorneys' fees? Of course a person will disagree with their opponent's attorneys, but does the First Amendment *therefore* prevent the state from exacting attorneys' fees from losing parties? I don't think the Court is likely so to hold. But the literal language of *United Foods*, certainly implies this conclusion.<sup>54</sup>

The real problem of *United Foods*, however, is taxes.<sup>55</sup> Through taxes we are every day forced to pay for the speech of government officials with whom we disagree. Does it follow that such taxes are constitutionally questionable? Or does it follow that taxes never support government speech? The implications of *United Foods*, if its broad language is taken literally, are flatly unacceptable.

Lower courts are supposed to obey the language of Supreme Court opinions. So it should come as no surprise that in *Livestock Marketing Ass'n v. Department of Agriculture* the Eighth Circuit held that the First Amendment prevents taxpayers from being taxed to pay for government speech with which they disagree.<sup>56</sup> And of course once the Court realized the implications of its own broad dicta in *United Foods*, it immediately realized that it had to intervene to

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51. 533 U.S. 405.

52. *Id.*

53. *Id.* at 416 (holding that mandatory assessments by the Government which fund speech with which a party disagrees "are not permitted under the First Amendment.").

54. *Id.* at 416 (citing *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985)).

55. *Id.* at 425–26.

56. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 556–57 (2005).

disown those implications. So it promptly granted certiorari and reversed in *Johanns*, a decision authored by Scalia holding that citizens can be forced to subsidize government speech.<sup>57</sup>

The holding seems obviously correct, but what justifies it? Why should forced subsidization of government speech not raise any First Amendment issue, but forced subsidization of other speech raise a First Amendment problem? Scalia makes the problem especially puzzling because he emphasizes that a First Amendment problem would be raised if persons were forced to subsidize speech that could be attributed to them, even if such speech were government speech.<sup>58</sup> Thus *Johanns* specifically remands the case to determine if the government speech in the case could be attributed to the beef producers. If the government speech is so attributable, apparently a First Amendment issue would arise.

This holding seems to put *Johanns* on a collision course with the major precedent in the area, *Wooley v. Maynard*,<sup>59</sup> in which a Jehovah's Witness named Maynard objected being forced to put on his car a New Hampshire license plate that said "Live Free or Die." The claim, which the Court upheld, was that the slogan on license plate constituted compelled speech.<sup>60</sup> Then Justice Rehnquist dissented, asking whether the case involved any compelled speech at all. Rehnquist argued, not unreasonably, that no one attributed the slogan on the license plate to Maynard. The slogan was stamped on the license plate by the state of New Hampshire and had nothing whatever to do with Maynard's speech.<sup>61</sup>

In his opinion for the Court, Chief Justice Burger replied that the license plate was analogous to a mobile billboard for the state's message that Maynard was required to display. But of course being forced to sustain a mobile billboard is different from being forced to speak. It is more analogous to having your property drafted into the service of the state. So on this account *Wooley* is about the

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57. *Id.* at 562 ("Citizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech.").

58. *Id.* at 567 n.11.

59. *Wooley v. Maynard*, 430 U.S. 705 (1977).

60. *Id.* at 717 ("[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message.")

61. *Id.* at 720 (Rehnquist, J., dissenting) ("The State has not forced appellees to 'say' anything.").

compelled subsidization of government speech.<sup>62</sup> But in *Johanns*, as we have seen, Scalia writes that persons can not under the First Amendment object to being compelled to subsidize the state's speech unless it is attributable to them.<sup>63</sup> Either the state's slogan in *Wooley* is or is not attributable to Maynard; either way the decision is inconsistent with *Johanns*. And this conceptual instability just scratches the surface, because *Johanns* does not even begin to qualify the broad assertion of *United Foods*<sup>64</sup> that *any* compelled subsidization of another's speech poses a First Amendment problem. It is plain that this loose and unsustainable language is going to cause trouble sometime in future.

Putting aside cases like attorneys' fees or juries or subpoenas, I want to focus for a few moments on the problem this assertion will cause in the specific context of commercial speech. All the early commercial speech cases focused on an audience's right to hear rather than on a speaker's right to express himself. Commercial speech doctrine rests upon the importance of circulating information, which necessarily implies that a speaker's right to say what she wishes is constitutionally de-emphasized.

This implication lies at the core of one of *Zauderer*,<sup>65</sup> one of foundational commercial speech cases which holds that the state can routinely compel disclosures in order to remedy potentially misleading commercial speech. The holding of *Zauderer* is quite significant. Government cannot compel someone to speak in public discourse; it cannot say to the *New York Times*: "You are leaving out relevant facts; your editorial is misleading and you had better amplify it." The reason that the state can not compel public discourse is that we care very much about the autonomy of speakers within public discourse. But, thanks to *Zauderer*, almost all consumer protection regulation rests on exactly the opposite assumption about commercial speakers. We do not constitutionally prize the autonomy of commercial speakers; we care about the accuracy of the information that they circulate to the public. If the state compels commercial speakers to divulge more information, the

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62. *Id.* at 715.

63. *Johanns*, 544 U.S. at 562.

64. *United States v. United Foods*, 533 U.S. 405, 413 (2001).

65. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

state *increases* the First Amendment value of commercial speech by communicating more information to the public.

*Zauderer* created a regime that allowed government routinely to mandate the disclosure of information in order to promote transparent and efficient markets. Any economist will tell you that a marketplace with more information is a more efficient market, because information promotes accurate consumer choice. State regulation compels disclosure not merely to prevent deception, but to make markets more efficient. If you look at your clothes you are now wearing, for example, you will find labels that say “Made in the U.S.” or “100% wool.” These labels are mandated in order to prevent deception, but to promote transparency and efficiency. A similar rationale underlies the vast bulk of securities regulation.

The requirement of the disclosure of information to produce a more efficient market is flatly contradictory to the assertion in *United Foods* that commercial speakers possess a First Amendment interest not to be forced to disclose accurate information. *Johanns* leaves this assertion in place, which means that even after *Johanns*, if we are to take the language of *United Foods* literally, the state can not compel commercial speakers to disclose information in order to pursue perfectly ordinary regulatory aims that lie at the foundation of the administrative state’s efforts to promote efficient and transparent markets.

My diagnosis is that the Court in *United Foods* treats speech abstractly; it assumes that the same rules apply to all speech. I believe that this is flatly wrong. It is one thing to compel persons to speak in the context of public discourse, and it is an entirely different thing to compel persons to speak in the context of selling goods. The Court fails to specify the exact constitutional values that are at stake in different kinds of speech, and it tries to fashion a one-size-fits-all doctrine. The result is a mess.

I just want to conclude by noting that there are two distinct lines of cases that are at issue in *United Foods*. The first, which I’ve just discussed, concerns compelled speech. The second, which I have not so far mentioned and which is analytically distinct, concerns compelled association. We have a First Amendment right to associate, and therefore we also have a First Amendment right not to associate. But, what is the First Amendment right of association? I do not have a First Amendment right to associate in order to form a



corporation. I do not have a First Amendment right to associate in order to marry.

The First Amendment right of association has to be carefully defined. It means that we have a First Amendment right to associate together for the purpose of engaging in activities that the First Amendment otherwise protects. I have a right to associate in order to engage in the kind of speech that the First Amendment protects. It follows that only those associations dedicated to the kind of speech that is protected by the First Amendment can come within the umbrella of the First Amendment right of association.

Persons have the right not to be compelled to join associations that engage in First Amendment protected speech. This right is analytically distinct from the right not to be forced to subsidize ideological speech. This point was clarified in another Supreme Court trilogy: *Abood*,<sup>66</sup> *Ellis*,<sup>67</sup> and *Lehnert*.<sup>68</sup> This line of cases concerns compelled association with a union. Because unions engage in First Amendment protected speech, persons can't be forced to associate with unions except for a very good reason. The Court uses what is known as the "germaneness" test to assess the strength of the reasons that can sustain compelled association. The germaneness test is analytically distinct from compelled speech. So, for example, unless the requirement is "germane" to some very important state interest, one can not be forced to associate with a union even to the extent of being required to purchase a mandatory union life insurance policy, even though compelling someone to purchase a life insurance policy would not, by itself, trigger any First Amendment scrutiny. This demonstrates that the right not to be compelled to subsidize speech, and the right not to be compelled to associate with an expressive association, are analytically distinct.

*United Foods* is a very ambiguous opinion. One possible interpretation of the case is that the required contributions of the mushroom growers constitutes impermissible coerced affiliation. Insofar as *United Foods* is about coerced affiliation, however, it must stand for the proposition that persons have the right not to be forced to associate with an association that engages only in commercial

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66. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

67. *Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Express & Station Employees*, 466 U.S. 435 (1984).

68. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991).

speech. But on this reading, *United Foods* implies that there is a right to associate to engage in commercial speech. *United Foods* is the first time that any such implication appears in the pages of the United States Reports. Let us test the consequences of this implication. Suppose I am affiliated with an advertising agency, a group that engages only in commercial speech. Are the rules of who may and may not be required to affiliate with the advertising agency controlled by the First Amendment? Does the Constitution override the usual laws of corporate governance or partnership? What could that possibly mean? Such an absurd consequence would necessarily follow from interpreting *United Foods* to stand for the proposition that persons have a right to associate to engage in commercial speech.

Analytically, therefore, there are two distinct problems that stem from the *Glickman*, *United Foods*, *Johanns* line of cases. The first is the question of coerced subsidization of speech, and in particular of commercial speech; the second is the question of whether commercial association counts as an expressive association for purposes of the First Amendment.

WEINSTEIN: Thank you, Robert. Kathleen, would you care to respond?

SULLIVAN: Okay, well, Robert has touched on so many points. It's such a rich collection of ideas that I'll just try to intersect with a few of them. Let me just start with the comparison to *Zauderer*.<sup>69</sup> I think what Robert has tried to suggest here is that we should be very friendly to compelled speech in the commercial speech area, because in this area, first of all, the First Amendment value at stake is the flow of information. And, as Justice Breyer says consistently in all his opinions in these cases, whether he's in the majority or the dissent, if the value is the free flow of commercial information, then pro-speech mandatory exactions are a good thing and you can't see them as speech-inhibiting. I remember that, when Justice Breyer was getting ready for his Senate confirmation hearings—we were colleagues then—he kept saying that there are free speech interests on both sides of all of these cases. And he sees himself oftentimes as

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69. *Zauderer*, 471 U.S. 626.

a regulator looking to balance those interests, as for example in *Bartnicki v. Vopper*.<sup>70</sup> And if there's a free speech-enhancing aspect to the regulation, he'll see that not necessarily as a trump, but certainly something to be weighed against the speech-restricting value. So, first Robert suggests that compulsion is good because it's speech-enhancing. That's the Breyer position.

But second, he does a sneaky thing. He says *Zauderer* is the relevant case. Let's recall the facts of *Zauderer*.<sup>71</sup> *Zauderer* invalidates a number of limitations on lawyer speech, but it upholds the requirement that if you're going to advertise that you will do something on a contingency fee basis, you have to disclose whether the contingency fee is being taken gross or net of costs and expenses.<sup>72</sup> And, therefore, the client has a better understanding of what the lawyer's actual, real percentage cut is going to be.<sup>73</sup> In that case, the disclosure was efficiency-enhancing and factual.<sup>74</sup> The compelled disclosure in the compelled agricultural exaction line of cases, however, is neither about facts, nor is it pro-efficiency. It's not about facts because it's about the idea that all plums are good. We're not forcing people to disclose the fact that plums can be carcinogenic if eaten in certain quantities. In fact, the two skinniest justices emphasize the extent to which the disclosure here is not entirely factual. Justice Ginsburg is surely the skinniest justice, narrowly edging out Justice Souter who only eats cottage cheese and an apple for lunch and runs at night. The two skinniest justices, one in concurrence and one in dissent in *Glickman*, write that the government is speaking out of both sides of its mouth. It says, "Beef, it's what for dinner," then in the dietary guidelines, it tells you, "Don't eat too much animal fat, you should eat lots of grains and legumes and vegetables and fruits." Justice Scalia says, oh, well, there's no contradiction there. It's not saying, "Beef, it's what's for breakfast, lunch, dinner and your midnight snack." So, what's at

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70. 532 U.S. 514 (2001) (holding constitutionally protected a radio broadcast of an illegally intercepted telephone conversation, but noting that such broadcast also inhibited speech that the speakers intended to keep private).

71. *Zauderer*, 471 U.S. 626.

72. *Id.* at 652.

73. *Id.* at 651.

74. *Id.*

stake in these cases is really not what's at stake in *Zauderer* or in your SEC comparisons.

Go back to Seana Shiffrin's wonderful point in the colloquy earlier about how this is not about forcing people to disclose information over which they have asymmetrical access and that might be of interest to people making informed consumer decisions. It's really just not like that at all. It's, "all plums are good." In fact, you could go one step further and say all of these forced advertising schemes are counter to market efficiency because they prevent the growers from engaging in product differentiation and price discrimination by forcing them to advertise as if all plums are the same. They're claiming that, on a limited advertising budget, they shouldn't have to give in to this. It's a tough business with low margins, so they don't have the budget to go out and do niche plum advertising for their particular plums after they've spent money on the compulsory generic plum ads. So, it's neither factual nor efficient.

My last point on compulsion is that I think we should be very careful about accepting that compulsion is okay in the commercial speech area because of the different value we're serving than in other areas. Compulsion can go too far and compulsion can be stupid and excessive and it can actually be counter-productive and dry up speech. I was involved, for example, in getting dismissed an S.E.C. complaint seeking regulatory enforcement of Regulation FD (Fair Disclosure),<sup>75</sup> and there, both the economic and First Amendment libertarian arguments converged: we argued successfully that, by telling a corporate speaker that if he discloses any material non-public information in a private gathering he has to file an 8K the next minute disclosing it to the world, the regulation will not in fact level the playing field by ensuring that the little guy will get all the information the Goldman Sachs guys got at the dinner. It will simply mean the corporate speaker will never again speak in any setting that is private about anything whatsoever, and there will be less speech rather than more. And, of course, there were twenty-two professors of free speech who lined up against me—Steve Shiffrin was among them saying that this was an idiotic argument from a First

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75. 17 C.F.R. §§ 243.100–103 (2007); see *S.E.C. v. Siebel Systems, Inc.* 384 F. Supp. 2d 694 (S.D.N.Y. 2005).

Amendment perspective. But we did win, and I do think that economic considerations line up with speech considerations in these cases to suggest that, at least sometimes, speech compulsion will actually be counterproductive to the goal of more speech. So for those reasons, I wouldn't so casually say that the compulsion here is fine.

POST: I think Kathleen is absolutely right, which she always is, that *United Foods* and *Kennedy* attempt to distinguish *Zauderer* by asserting that the state interest *Zauderer* was preventing deception, whereas in *United Foods* there was no issue of deception. But, if you carefully examine *Zauderer*, the reasoning of the opinion does not turn on the strength of the state's interest. In his opinion for the Court in *Zauderer*, White stresses that rational basis review is appropriate<sup>76</sup> because commercial speech is protected in order to safeguard the flow of information, and the regulation at issue increases the circulation of information. It is true that White does not *entirely* deny the autonomy interests of commercial speakers, but he states explicitly that they are residual and minimal. If that is true, then the state needs only a rational interests in order to overcome the autonomy interests of commercial speakers. In *United Foods*, the government's interest in support of its regulation was not deception, but rather the promotion of mushroom marketing. That is a perfectly ordinary rational interest of the administrative state. It is certainly a powerful enough interest to overcome a merely residual autonomy interest.

So the real question is how much of an autonomy interest do commercial speakers retain. That's the crucial issue. How powerfully do we want to protect the autonomy of commercial speakers? And the greater the autonomy interest we attribute to commercial speakers, the more difficult it will be to sustain the perfectly pervasive and normal regimes of consumer protection that now govern most markets.

SULLIVAN: I want to get in just one other response to Robert, then I'd love to hear what Jim has to say and what you all have to say. The second point on which I wanted to engage with Robert, in addition to

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76. *Zauderer*, 471 U.S. at 651.

the compulsion point, was that he suggests that the Souter school—and the Souter school, let's face it, is just Souter if we look at all three cases—the Souter school insofar as he picks up other votes says autonomy is the governing principle here, and Robert raises questions about whether autonomy can have much bite—he's not saying it has none—but whether it can have much bite in this area because, as Justice Stevens suggests, this is a far cry from *Barnette*.

Compelling speech in this area, it is true, is a far cry from the ideological incursion involved in making a Jehovah's Witness worship a graven image. But, let's give Souter a little bit of his due. He's not just making an unbridled autonomy argument. He's making a complicated political process argument: a kind of *Carolene Products* footnote four argument about the reliability of political processes.<sup>77</sup> He's suggesting that, in the general taxation area, there will be checks that prevent invidious burdens on unwilling speakers because in the general taxation area it will all even out over time. Regimes will change, we'll have divided government, the priorities of government will change, and there won't be entrenched losers who are imposed upon through the taxation scheme.

He says spot taxation is different, because when you have spot taxation for a particular market group you don't have those political checks, and therefore, we have to be more careful whether we're invidiously burdening someone to say, "My plum's as good as his plum," when you want to say, "My plum's better than his plum." To some people, that's important. We go back to the theme yesterday that it may be important to people to make commercial differentiations. So, that's not an insensible argument. There's a certain plausibility here. This is a spot taxation case. The question you might raise is why is spot taxation any worse for speech than for other regulatory claims? Isn't this just the thin, small voice of *Lochner* raising its head under the cloak of the First Amendment when in fact the objection is one that you might make to the taking that's involved more generally? The objection is to the Stalinism, not to the speech component of the Stalinism. That may be a legitimate point. Those who are favorable to the more libertarian view here think any small inroad you can make against Stalinism is a good first step. But I do think it's legitimate to ask whether Souter

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77. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938)

has adequately tied his political process reasoning to the First Amendment.

WEINSTEIN: It occurred to me as well that some of the opinions in these cases evince a thinly veiled hostility towards the collectivist, Roosevelt-era agricultural marketing orders under which some of these advertising regulations were promulgated. It would really be unfortunate if these Justices were using the First Amendment to express hostility towards a type of economic arrangement with which they disagree. I too have my doubts about the wisdom and fairness of this type of regulation, particularly in this day and age, but this just isn't a legitimate First Amendment concern. And not only in these cases, but other areas of constitutional law as well, such as in the recent punitive damage cases<sup>78</sup> or on constitutional restrictions on personal jurisdiction<sup>79</sup> there is a similar unacknowledged re-emergence of restrictions on economic regulation. Maybe what's happening is that the pendulum is finally beginning to swing back slightly from the Court's total withdrawal from imposing due process limitations on economic regulation that occurred as a reaction, or arguably overreaction, to the abuses of the *Lochner* era. But even if some degree of judicial oversight of economic legislation is appropriate as a matter of substantive due process, it's very bad news for this concern to be cropping up in First Amendment jurisprudence. Not only is it illegitimate to use the First Amendment to vindicate general liberty concerns such as these, not to mention simple disagreement with economic policy, but doing so will also threaten the coherence of free speech doctrine.

POST: In his dissent in *Glickman*, Justice Thomas actually refers to *Lochner* with something like approval. He winks slyly and says that courts may not be able to second-guess the rationality of economic

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78. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996). Between the date of the live symposium and the publication of this issue, the Supreme Court decided another case confirming the speaker's point, *Philip Morris USA v. Williams*, 127 S.Ct. 1057 (2007).

79. See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985). For a discussion of the personal jurisdiction requirement as a species of substantive due process, see James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 231-32 (2004).

regulation, but they can second-guess the rationality of regulations of commercial speech.

In *Johanns*, Souter actually offers two distinct arguments for his position. The first is that speakers cannot be forced to subsidize government speech if the government is not democratically accountable for its speech. Souter says that there is no democratic accountability for the beef advertisements at issue in *Johanns*, so that Scalia's claimed exception for the subsidization of government speech ought not to apply. I think Souter has a fair point about whether the advertisements at issue in *Johanns* ought to be considered government speech. But I don't understand how the question of democratic accountability has anything to do with protecting the autonomy of persons, which Souter explicitly claims is the underlying constitutional value at issue in the case. I don't see how the autonomy of persons is any less violated merely because government speech is more democratically accountable.

The second argument that Souter makes is that supporting state speech money with money derived from spot taxation is more galling to the autonomy of persons than supporting state speech from funds gathered from general taxes. To test this argument, we might consider the regulatory regime that California uses for tobacco. California imposes an excise tax on tobacco, and California uses the funds created by this tax to pay for anti-smoking ads. The tobacco companies sued, arguing that it was really galling to force them to pay for anti-smoking advertisements. The question raised by Souter's argument suggests that the constitutionality of California's anti-smoking campaign depends upon the method that it uses to pay for it.

Souter seeks to support his argument by citing Jefferson's point that the State cannot force someone to pay for a church that preaches a doctrine with which he disagrees. We do have in our constitutional resources the idea that being forced to pay for a church or religious doctrine might violate my conscience. But we have never made the analogous point in regard to speech. If we accept the analogy to the Establishment Clause, then all taxes to support government speech, not merely spot taxes, are offensive to my autonomy. But Souter argues that we ought to make a distinction between state speech supported by spot taxes and state speech supported by the general fund. I don't follow this argument. Why is one form of government



speech any more offensive to autonomy than the other? Why should the constitutionality of government speech turn on the government's accounting system, on how it chooses to pay for its own speech?

[End of Discussion]

